

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

EDDIE PRINCE ROBINSON, III,

Plaintiff,

v.

JOHN WILCHER, CHATHAM COUNTY
SHERIFF IN HIS OFFICIAL CAPACITY,
CORIZON HEALTH, INC., JOSEPH MOYSE,
MD CARL FAULKS, MD, and JOHN DOES
1-99,

Defendants.

)
)
)
)
) CIVIL ACTION
) FILE NUMBER:
) 4:16-CV-00179

**BRIEF IN SUPPORT OF SPECIAL APPEARANCE MOTION TO DISMISS
PLAINTIFF'S COMPLAINT ON BEHALF OF
DEFENDANT JOSEPH MOYSE, MD**

COMES NOW, Joseph Moyse, MD ("Defendant Dr. Moyse"), improperly named as a Defendant in the above-styled action, **by special appearance, without subjecting himself to the jurisdiction of this Court or waiving any of his affirmative or other defenses, and expressly reserving all defenses raised in his Special Appearance Answer**, by and through counsel, and files this Brief in Support of Special Appearance Motion to Dismiss Plaintiff's Complaint, showing this Honorable Court as follows:

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Plaintiff filed the present action on May 18, 2016 in the Superior Court of Chatham County against Defendants Corizon Health, Inc., John Wilcher, Carl Faulks, MD and Joseph Moyse, MD. (Doc. 1-2). Defendants Carl Faulks and Corizon Health, Inc. thereafter acknowledged service of the Complaint, which were filed with the Superior Court of Chatham County on June 9, 2016. (Doc. 1-1). On June 28, 2016, Defendant John Wilcher also acknowledged service of the Complaint. (Id.). Because Plaintiff's Complaint includes claims for damages under 42 U.S.C. § 1983, this Court has jurisdiction on the basis of federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. Accordingly, Defendants Corizon Health, Inc., John Wilcher, and Carl Faulks, MD timely removed the case from the Superior Court of Chatham County to this Court on June 30, 2016. (Doc. 1).

Defendant Dr. Moyse has not been properly served with a copy of the Summons and Complaint in this lawsuit. (Affidavit of Joseph Moyse, MD (hereinafter "Moyse Affidavit"), ¶ 3, attached hereto as Exhibit "A"). Defendant Dr. Moyse and his wife, Marie Gabrielle Louis, reside at 416 Woodland Estates Drive, North Baldwin, NY 11510. (Moyse Affidavit, ¶ 5; Affidavit of Marie Gabrielle Louis [hereinafter "Louis Affidavit"], ¶ 3, attached hereto as Exhibit

“B”). No one else resides with Defendant Dr. Moyse and Ms. Louis at that address. (Id.). Defendant Dr. Moyse was out of the country in Haiti from June 4, 2016 through July 31, 2016 performing volunteer service. (Moyse Affidavit, ¶ 2; Louis Affidavit, ¶ 4).

On or about June 21, 2016, while this case was still pending in the Superior Court of Chatham County, a process server claims to have attempted to perfect proper service on Defendant Dr. Moyse at 416 Woodland Estates Drive, North Baldwin, NY 11510. (Exhibit “A” to Doc. 11-1). Specifically, the process server claims to have made service upon “‘JANE DOE’ Wife” at the above address, who he described as a 51 to 65 year-old Black female with black hair that is between 5’9” and 6’0” tall and weighs between 131 and 160 pounds. (Id.). Ms. Louis, however, did not see or speak with a process server on June 20, 2016 or June 21, 2016, and no one attempted to personally hand her or otherwise give her any lawsuit papers at any time. (Louis Affidavit, at ¶ 6). Instead, Ms. Louis found a dirty package outside next to the bushes by the patio that appeared to have been outside for a while. (Id., at ¶ 7). Ms. Louis is a 63 year old, 5’4” African-American female with brown hair and golden highlights and weighing approximately 135 pounds. (Id., at ¶ 2).

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff Failed to Properly Serve Defendant Dr. Moyse.

Because the attempted service on Dr. Moyse occurred while the case was still pending in the Superior Court of Chatham County, this Court must analyze the service under Georgia law. See White v. Capiro Partners, LLC, 2015 WL 5944943, at *2 (S.D. Ga. 2015) (“In cases removed from state courts, the sufficiency of service of process attempted before removal is governed by state law.”); Moore v. Raymer, 916 F. Supp. 2d 1332, 1339 (N.D. Ga. 2013) (“In actions removed from state court, the sufficiency of service of process prior to removal is determined by the law of the state from which the action was removed.”). A Georgia court cannot maintain proper jurisdiction over a civil claim unless service of process has been properly perfected by Plaintiff. O.C.G.A. § 9-11-4; Wilkinson v. Udinsky, 242 Ga. App. 464, 464 (2000). Further, defective service is equivalent to no service at all. See Clark v. Dennis, 240 Ga. App. 512, 512 (1999); Jones v. Roberts Marble Co., 90 Ga. App. 830, 833 (1954). Until service is perfected or waived, there is no “pending suit” and the trial court has no jurisdiction or authority to enter any ruling in the case except for a ruling dismissing the case for lack of jurisdiction. Thorburn Co. v. Allied Media of Ga., 237 Ga. App. 800, 802 (1999); see also DeJarnette Supply Co. v. F.P. Plaza, Inc., 229 Ga. 625, 625 (1972). Insufficient

service of process is an affirmative defense that justifies dismissal of a plaintiff's claims. O.C.G.A. § 9-11-12(b)(5); Gamlins, Solicitors, & Notaries v. A.E. Roberts & Assocs., 254 Ga. App. 763, 765 (2002); Merck v. St. Joseph's Hosp. of Atlanta, Inc., 251 Ga. App. 631, 632 (2001). Thus, when a plaintiff fails to properly effectuate service, "a motion to dismiss is the proper vehicle to seek resolution of the issue of lack of service or insufficient service of process." Terrell v. Porter, 189 Ga. App. 778, 779 (1989).¹

O.C.G.A. § 9-11-4(e)(7) provides that service is to be made by providing the service documents ". . . to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode **with some person of suitable age and discretion then residing therein**". (emphasis added). It is thus well established in Georgia law that when service papers are not provided to the defendant personally, they must be provided to a **resident** of the abode. Bible v. Bible, 259 Ga. 418, 418 (1989) (emphasis added). See also Guerrero v. Guerrero, 296 Ga. 432 (2015) (service upon an "occupant" who was a prior resident of the rental property where defendant presently resided was improper); Williamson v. Basenback, 298 Ga. App. 567 (2009) (service upon defendant's son who did not reside at defendant's house was improper); Acord v. Maynard, 198 Ga. App. 296

¹ Submission of affidavits in support of a motion to dismiss for lack of jurisdiction over the defendant does not transform the motion into one for summary judgment. Id.

(1991) (service upon defendant's daughter-in-law who did not reside at defendant's home was improper); Mahone v. Marshall Furniture Co., 142 Ga. App. 242 (1977) (service upon babysitter who was not a resident of the household was insufficient).

The Affidavit of Suitable Service on which Plaintiff relies for the contention that Dr. Moyse was properly served provides that service was made on a person identified as "'JANE DOE' Wife" at 416 Woodland Estates Drive, North Baldwin, New York 11510. (Exhibit "A" to Doc. 11-1). The Affidavit states that this Jane Doe is an African-American female, 5'9" - 6'0" tall with black hair. (Id.). It also provides that this Jane Doe resides at that location, but provides no explanation as to how that purported determination was made. (Id.). Regardless, the purported determination is inaccurate based upon the sworn evidence in the case.

The evidence establishes that Dr. Moyse's wife, Marie Gabrielle Louis, is an African-American female standing only 5'4", and she has brown hair with golden highlights. (Louis Affidavit, ¶ 2). This does not match the process server's description of Jane Doe, who is 5'9" to 6'0" tall and has black hair. Moreover, Dr. Moyse's wife did not see or speak with a process server on June 20, 2016 or June 21, 2016, and no one attempted to personally give Dr. Moyse's wife any lawsuit papers at any time. (Id., ¶ 6). Dr. Moyse, who has been out of the country in Haiti

from June 4, 2016 through July 31, 2016, has similarly not been served with or personally handed any lawsuit papers. (Id. at ¶ 4; Moyse Affidavit, ¶¶ 2, 3 and 4). It is undisputed that no one else lives with Dr. Moyse and his wife, Ms. Louis. (Louis Affidavit, ¶ 3; Moyse Affidavit, ¶ 5). Hence, whomever the process server spoke to was not a resident of Dr. Moyse's dwelling house, and it was not Defendant Dr. Moyse or his wife, the only residents of 416 Woodland Estates Drive, North Baldwin, NY 11510. Additionally, the process server does not state that he left a copy of the lawsuit at Defendant Dr. Moyse's dwelling house **with some person of suitable age and discretion then residing therein**. In fact, the process server does not state the name of the person with whom he purportedly spoke. To the contrary, the evidence establishes that Ms. Louis merely found a dirty package outside next to the bushes by the patio that appeared to have been outside for a while. (Id., at ¶ 7).

It is well established that when service papers are not provided to the defendant personally, they must be provided to a resident of the abode. Bible, 259 Ga. at 418; Guerrero, 296 Ga. 432; Williamson, 298 Ga. App. 567; Acord, 198 Ga. App. 296; Mahone, 142 Ga. App. 242. Because the person who was allegedly served on behalf of Defendant Dr. Moyse with a copy of the Summons and Complaint is clearly not a resident of Defendant Dr. Moyse's abode, Defendant Dr.

Moyse has not been properly served in this matter.² Therefore, Plaintiff's Complaint should be dismissed with prejudice as to Defendant Dr. Moyse. O.C.G.A. § 9-11-12(b)(5); Gamlins, Solicitors, & Notaries, 254 Ga. App. at 765; Merck, 251 Ga. App. at 632.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Joseph Moyse, MD respectfully moves this Court to grant its Special Appearance Motion to Dismiss Plaintiff's Complaint with prejudice.

This 5th day of August, 2016.

Respectfully submitted,

/s/ Brynda Rodriguez Insley

BRYNDA RODRIGUEZ INSLEY

Georgia Bar No. 611435

Attorney for Defendant

Joseph Moyse, MD

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, NE, Suite 200
Atlanta, GA 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

² Should Defendant Dr. Moyse be properly served in this matter, he will promptly consent to removal of this case from the Chatham County Superior Court to this Court. In fact, counsel for Defendant Dr. Moyse offered to acknowledge service on his behalf upon request, but Plaintiff's counsel refused. (See July 26, 2016 email, a copy of which is attached hereto as Exhibit "C".)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing BRIEF IN SUPPORT OF SPECIAL APPEARANCE MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT JOSEPH MOYSE, MD upon all parties to this matter through the Clerk of Court using the CM/ECF system and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follow:

Attorneys for Plaintiff:

William R. Claiborne, Esq.
The Claiborne Firm, PC
410 East Bay Street
Savannah, GA 31401

S. Wesley Woolf, Esq.
David J. Utter, Esq.
S. Wesley Woolf, PC
408 East Bay Street
Savannah, GA 31401

Attorneys for Corizon Health, Inc.:

Tom Carlock, Esq.
Emily Ward, Esq.
Carlock Copeland & Stair
191 Peachtree Street
Suite 3600
Atlanta, GA 30303

Attorneys for John Wilcher:

Benjamin M. Perkins, Esq.
Oliver Maner, LLP
P. O. Box 10186
Savannah, GA 31412

This 5th day of August, 2016.

Respectfully submitted,

/s/ Brynda Rodriguez Insley

BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435

Attorney for Defendant
Joseph Moyse, MD

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, NE, Suite 200
Atlanta, GA 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), the undersigned counsel hereby certifies that the foregoing pleading was prepared in Times New Roman 14-point font, in compliance with Local Rule 5.1(C).

This 5th day of August, 2016.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435

Attorney for Defendant
Joseph Moyse, MD

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, NE, Suite 200
Atlanta, GA 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

EXHIBIT “A”

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

EDDIE PRINCE ROBINSON, III,)

Plaintiff,)

v.)

CIVIL ACTION

FILE NO. 4:16-CV-00179

JOHN WILCHER, CHATHAM COUNTY)

SHERIFF IN HIS OFFICIAL CAPACITY,)

CORIZON HEALTH, INC., JOSEPH)

MOYSE, MD, CARL FAULKS, MD, and)

JOHN DOES 1-99,)

Defendants.)

AFFIDAVIT OF JOSEPH MOYSE, MD

PERSONALLY APPEARED before me, the undersigned officer duly authorized by law to administer oaths, Joseph Moyse, MD, who, upon being duly sworn, deposes and states as follows:

1.

My name is Joseph Moyse, MD. I am over the age of 21, suffer no legal disabilities and am otherwise qualified to give this Affidavit. I give this Affidavit based upon my personal knowledge of its contents, and for use as evidence in the above-styled action and for any lawful purpose.

2.

I have been out of the country in Haiti from June 4, 2016 through July 31, 2016 performing volunteer service.

3.

I have not been personally served with any lawsuit papers in the present lawsuit.

4.

To the best of my knowledge, no one has attempted to personally hand me any lawsuit papers or ask me to acknowledge or waive service of the present lawsuit.

5.

My permanent address is 416 Woodland Estates Drive, North Baldwin, NY 11510, and only my wife, Marie Gabrielle Louis, and I reside at this address.

FURTHER AFFIANT SAYETH NOT.

Joseph G. Moyse M.D.
Joseph Moyse, MD

Sworn to and subscribed before me this

4TH day of AUG, 2016.

April A. Smith
NOTARY PUBLIC

My Commission Expires: MAY 27, 2018

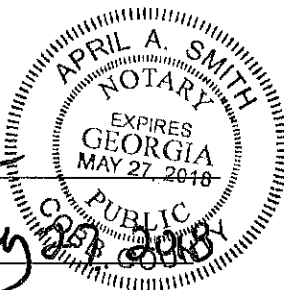


EXHIBIT “B”

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

EDDIE PRINCE ROBINSON, III,)

Plaintiff,)

v.)

CIVIL ACTION

FILE NO. 4:16-CV-00179

JOHN WILCHER, CHATHAM COUNTY)

SHERIFF IN HIS OFFICIAL CAPACITY,)

CORIZON HEALTH, INC., JOSEPH)

MOYSE, MD, CARL FAULKS, MD, and)

JOHN DOES 1-99,)

Defendants.)

AFFIDAVIT OF MARIE GABRIELLE LOUIS

PERSONALLY APPEARED before me, the undersigned officer duly authorized by law to administer oaths, Marie Gabrielle Louis, who, upon being duly sworn, deposes and states as follows:

1.

My name is Marie Gabrielle Louis. I am over the age of 21, suffer no legal disabilities and am otherwise qualified to give this Affidavit. I give this Affidavit based upon my personal knowledge of its contents, and for use as evidence in the above-styled action and for any lawful purpose.

2.

I am married to Joseph Moyse, MD. I am a 63 year old, 5'4" African American female with brown hair and golden highlights and weighing approximately 135 pounds.

3.

I reside with my husband at our townhome located at 416 Woodland Estates Drive, North Baldwin, NY 11510. No one else resides with us.

4.

My husband has been out of the country in Haiti from June 4, 2016 through July 31, 2016 performing volunteer service.

5.

I understand that a process server claims to have spoken to me on June 20, 2016 and/or June 21, 2016, and further claims to have made service "by delivering a true copy therefor to and leaving with 'Jane Doe' Wife a person of suitable age and discretion at Woodland Estates Drive, North Baldwin, NY 11510 said premises being the recipient's actual place of abode within the State of New York."

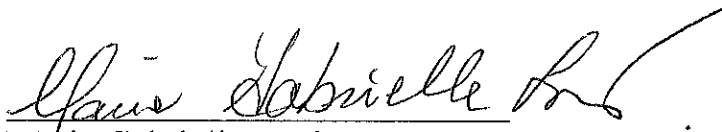
6.

I did not see or speak with a process server on June 20, 2016 or June 21, 2016, and no one attempted to personally hand me or otherwise give me any lawsuit papers at any time. Whoever the process server spoke to was not me.

7.

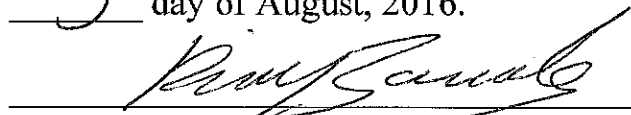
I found a package outside next to the bushes by the patio. I do not recall the exact date I found them, but, the package was dirty and appeared to have been outside for a while.

FURTHER AFFIANT SAYETH NOT.


Marie Gabrielle Louis

Sworn to and subscribed before me this

3 day of August, 2016.


NOTARY PUBLIC

My Commission Expires: 11/13/18

RINA V. ZAVALA
Notary Public, State of New York
Qualified in Nassau County
Reg. No. 01ZA6271919
My Commission Expires 11-13-2018

EXHIBIT “C”

From: Brynda Insley
To: Wesley Woolf
Cc: will@claibornefirm.com; Cameron Kuhlman; David Utter; Philip Henderson; April Smith; Ward, Emily C. (eward@carlockcopeland.com); Ben Perkins (bperkins@olivermaner.com); lmeadows@olivermaner.com
Subject: Re: Activity in Case 4:16-cv-00179-WTM-GRS Robinson, III v. Wicher et al Motion to Remand
Date: Wednesday, July 27, 2016 6:42:28 PM

Wes, based upon my separate conversations with Dr Moyse and his wife, Dr Moyse was/is out of the country and his wife did not speak to or see the process server at any time. I don't know who Jane Doe was yet, but the description does not match the wife. She says she's 5'4". Bottom line is it wasn't the wife and no one else resides there.... so service is not proper under state or federal law. The process server left the papers next to some bushes. Brynda

Sent from my iPhone

On Jul 27, 2016, at 5:49 PM, Wesley Woolf <woolf@woolflawfirm.net> wrote:

Brynda:

We believe service was effective and that remand is appropriate under the circumstances. We don't want to cause your clients unnecessary trouble and expense so please share the evidence you intend to offer the Court to carry your burden of demonstrating ineffective service of process.

Wes

S. Wesley Woolf
S. WESLEY WOOLF, P.C.
408 East Bay Street
Savannah, Georgia 31401
T: 912-201-3696
F: 912-236-1884
woolf@woolflawfirm.net

From: Brynda Insley [<mailto:binsley@insleyrace.com>]
Sent: Tuesday, July 26, 2016 10:21 PM
To: Wesley Woolf <woolf@woolflawfirm.net>
Cc: will@claibornefirm.com; Cameron Kuhlman <Cameron@claibornefirm.com>; David Utter <utter@woolflawfirm.net>; Philip Henderson <phenderson@insleyrace.com>; April Smith <asmith@insleyrace.com>; Ward, Emily C. (eward@carlockcopeland.com) <eward@carlockcopeland.com>; Ben Perkins (bperkins@olivermaner.com) <bperkins@olivermaner.com>; lmeadows@olivermaner.com
Subject: RE: Activity in Case 4:16-cv-00179-WTM-GRS Robinson, III v. Wicher et al Motion to Remand

Wes,

I have not heard back from you, and am following up my email below.

I am obtaining the Affidavits of Dr. Moyse and his wife to establish that service was not proper upon him. Dr. Moyse is out of the country and has been out of the country since on or about 6/4/16. His wife was not home and did not speak to the process server. The process server did not leave the papers with Dr. Moyse's wife, with anyone who lived at the home or with anyone all for that matter; rather, the process server left the lawsuit papers next to some bushes. This is not proper service under the Federal Rules of Civil Procedure. In a good faith attempt to resolve this matter, Dr. Moyse asks you to immediately notify the Court and withdraw the Motion to Remand.

Additionally, I intend to file a motion to dismiss for improper service by the end of the week. However, since Dr. Moyse is out of the country, he has authorized me to acknowledge service on his behalf if you so request.

Thank you.

Brynda

PS I am adding co counsel so that everyone is on the same page.
Thank you.